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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

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SUMMARY

TCG urges the Commission to ensure that regulations implementing the Communications Assistance for Law Enforcement Act ("CALEA") are consistent with the three policies Congress sought to balance in passing CALEA. First, the regulations should preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; second, they should protect privacy in light of powerful technologies; and third, they should avoid impeding the development of new communications services and technologies.

In this regard, TCG proposes certain modifications or clarifications to the proposed implementing regulations. First, TCG recommends that the "designated employee" obligations be applied only to a core group of primary contact point personnel. This approach would be more consistent with the policy of "narrowly focused" law enforcement and will reduce carrier and Commission administrative burdens, while meeting the Commission's goal of narrowly tailored, yet effective, CALEA implementation. In addition, TCG's proposal will not compromise customers' privacy, because non-designated employees will remain subject to internal privacy protection policies.

Second, TCG endorses the Commission's proposal to permit a small carrier to certify that it observes the CALEA policies, processes and procedures. This practice would allow small carriers to escape the burden of filing individual statements describing their security policies, processes, and procedures, while still ensuring carrier compliance with the regulations.

Third, the Commission must ensure the continued practice of reimbursement to carriers for the costs of meeting specific law enforcement requests and should clarify the procedures for determining whether compliance is reasonably achievable. At bottom, the Commission should ensure that cost recovery is available to all carriers subject to CALEA. Finally, TCG recommends that the Commission clarify what constitutes an "interception" to avoid inconsistent adherence to the regulations.

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Teleport Communications Group Inc. ("TCG") hereby submits its Comments regarding the Commission's Notice of Proposed Rulemaking for implementation of the Communications Assistance for Law Enforcement Act ("CALEA").¹

I. INTRODUCTION

Congress set forth three policies it sought to balance in passing CALEA: first, to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; second, to protect privacy in light of powerful and personally revealing technologies; and third, to avoid impeding the development of new communications services and technologies.² TCG urges the Commission to ensure that its promulgation of regulations implementing CALEA is consistent in all respects with these same policies, and submits comments in accordance with these balanced principles.

¹ In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356 (rel. October 10, 1997) ("NPRM").

² See id. at ¶ 5 (citing H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994)).

First, TCG proposes that the Commission narrow the applicability of a communications carrier's "designated employee" to a core group of primary contact personnel. Adoption of TCG's proposal will maintain narrowly tailored law enforcement surveillance that does not unduly burden communications carriers. Second, TCG supports the Commission's proposal to grant smaller carriers the option of filing a certificate of compliance rather than a description of its security procedures, processes, and policies. Third, TCG urges the Commission to ensure that carrier network upgrades and other expenses incurred under CALEA are appropriately reimbursed. Fourth, the Commission should clarify the definition of an "interception" to ensure uniform applicability of its rules.

II. THE COMMISSION'S PROPOSED PROCEDURES GOVERNING CARRIERS' DESIGNATED EMPLOYEES SHOULD APPLY ONLY TO A CORE GROUP OF CARRIER PERSONNEL

CALEA requires telecommunications carriers to modify and design their equipment, facilities, and services to ensure that authorized electronic surveillance can be performed.³ Specifically, carriers are required to establish internal policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity.⁴ The Commission has proposed requiring carriers to designate individual employees who will assist law enforcement officials in lawful interceptions. The Commission proposes to define a "designated employee" as

³ Id. at ¶ 6.

⁴ See id. at ¶ 30.

one who knowingly participates in surveillance activities.⁵ However, this definition of a "designated employee" is unnecessarily broad and places an undue administrative recordkeeping burden on the Commission and carriers.

To preserve the balanced approach toward CALEA implementation envisioned by Congress and the Commission, TCG recommends that the "designated employee" obligations be applied to a core group of key contact point personnel who have the primary responsibility of carrying out a lawful interception request. First, this approach would be more consistent with the policy of "narrowly focused" law enforcement and will reduce carrier and Commission administrative burdens. Second, TCG's proposal satisfies the Commission's concerns by ensuring that privacy interests are still protected while minimizing the oversight burden for both the Commission and carriers. Customers' privacy will not be compromised, because non-designated employees will remain subject to internal privacy protection policies. Finally, and in any event, information required under this proposal should remain confidential in the spirit of protecting privacy under CALEA.

A. A Broad Definition of a "Designated Employee" Fails to Advance CALEA Policy Goals and Imposes an Undue Burden on the Commission and Carriers

The Commission's broad application of designated employees to encompass all employees who knowingly perform surveillance work is economically and administratively burdensome. This burden is not justified, because the

⁵ Id.

Commission's proposed application is unnecessary to achieve the policies set forth in CALEA. Under the Commission's proposal, carriers would be required to collect and maintain information and affidavits⁶ regarding hundreds of employees. Many of these designated employees would be used only intermittently, if ever, to satisfy an interception request, but under the Commission's proposed rules, would not fit within the Commission's reporting exception for those carriers who "unknowingly" carry out interception activities. As a practical matter, it is virtually impossible to instruct these employees to perform a portion of an intercept without their knowing that they are participating in an intercept.

However, such a broad interpretation of "designated employee" is unnecessary in light of the fact that its aims can be achieved through the more narrowly tailored application proposed by TCG, that only a core group of employees be considered "designated employees," while those employees intermittently involved with interceptions be regulated by internal company policies. The core group subject to reporting requirements would consist of those employees who primarily perform interceptions, such that part of their primary responsibilities are to complete lawful interception requests. These core employees oversee all lawful interception assignments to completion, and thus, receive instruction regarding CALEA, its policies and implementing regulations.

The Commission's proposal should be modified as suggested by TCG. In its current form, the broad "designated employee" policy essentially would leave the

⁶ Id. at ¶ 31.

carrier with two unenviable options: over-designate employees for the sake of compliance and sustain large administrative costs, or designate core surveillance employees that will be sent all over the country to satisfy interception requests, again at great cost. For example, TCG, with offices spanning from Staten Island, New York to Portland, Oregon, could designate a number of employees in each office to handle sporadic interception requests per office, or transport a small pool of designated employees around the country to meet such requests. Neither possibility is economically attractive; the first would require time-consuming recordkeeping under the Commission's proposal, and the second would require that unreasonable and unnecessary expenses be incurred.

At bottom, the imposition of the proposed recordkeeping requirement fails "to avoid impeding the development of new communications services and technologies," when carrier resources are devoted to burdensome, and unproductive recordkeeping. The proposed policy for "designated employees" is over-inclusive and leaves carriers with no reasonable method for fulfilling the Commission's goal that employees involved in interception be monitored for the sake of privacy rights. Indeed, the proposal is inconsistent with those CALEA provisions that support imposing minimal burdens upon carriers and condone deference to carrier input in this regard.⁷ Thus, TCG proposes that a core group

⁷ For example, Section 103 prohibits law enforcement officials from requiring carriers to use specific equipment, facilities, services, or systems configurations. Section 107 requires the Attorney General to consult with the industry in developing technical standards to comply with CALEA. *Id.* at ¶ 8.

be considered designated employees, while those employees only intermittently needed to carry out some portion of an interception request be governed by a company's internal policies intended to protect customer privacy.

The benefits of the TCG proposal would not be limited to carriers. The Commission also would benefit from the reduced administrative burden of this policy. For each designated employee record kept by the carriers, the Commission would be obligated to review them. TCG sees no merit in the Commission undertaking such a daunting task that could be more efficiently and effectively managed through self-monitoring under TCG's "core-group" proposal. In addition, the proposal is consistent with the Commission's own finding that for security reasons, carriers may wish to restrict their employees' knowledge of the interception activity they perform.⁸ The adoption of TCG's "core group" approach would satisfy the three-pronged CALEA policies by narrowly tailoring those employees routinely involved with interceptions, minimizing the burdens of implementation, and protecting privacy interests.

B. Carriers' Internal Customer Privacy Policies Address the Commission's Concerns Regarding Privacy

Minimizing the number of designated employees will not diminish protection of privacy, because those employees that only intermittently engage in authorized interception practices will still be governed by internal oversight. The principles guiding CALEA implementation call for narrowly focused interception capability

⁸ Id. at ¶ 30.

without undue burden on the carrier. The Commission's proposal fails to satisfy this principle because it imposes burdensome recordkeeping and oversight requirements for employees only minimally engaged in intercept activities. The Commission's clear intent to protect consumer privacy through sufficient employee oversight can be achieved in many instances through internal carrier oversight.

Carriers necessarily have in place policies concerning customer privacy that would address the Commission's concern for protecting privacy. These policies have been applied successfully to handle the private policy concerns raised by law enforcement requests, and TCG believes the policy will be applied with similar success in the future. Thus, at a minimum, the Commission should permit carriers to monitor the activities of those employees who are only intermittently used to satisfy interception requests, without the burden of additional reporting requirements. This approach is consistent with the Commission's efforts to reduce the administrative burden of implementing CALEA, particularly for small carriers.⁹

C. Information Concerning Designated Employees Should Be Deemed Confidential and Reviewable Only By Law Enforcement Officials

The Commission proposes that carriers maintain an official list of all personnel designated by the carriers to carry out lawful interceptions.¹⁰ The Commission also suggests that carriers could be required to designate a senior officer or employee to serve as the point of contact for law officials seeking

⁹ See also Part IV *infra*.

¹⁰ NPRM at ¶ 33.

designated employee information. This proposal, however, would entail continuous updating of a separate designated employee list and raises concerns regarding the type of information a carrier could or would release to a requesting law enforcement official about its employees.

Instead, the Commission should deem information concerning designated employees as confidential, such that the dissemination of such information be restricted to law enforcement officials upon request. This proposal is consistent with the intent of both Congress and this Commission to ensure that CALEA implementation remains as non-intrusive as possible. This policy should extend to those carrier employees who will be charged with the day-to-day implementation of CALEA, as well as carrier customers.

III. SMALL CARRIERS SHOULD BE PERMITTED TO FILE A CERTIFICATION OF COMPLIANCE IN LIEU OF SECURITY PROCEDURES AND POLICIES STATEMENT

The Commission has proposed to permit a small carrier merely to certify that it observes the policies, processes and procedures, rather than submission of a separate statement of the policies, processes, and procedures used to comply with CALEA regulations.¹¹ This practice would allow small carriers to escape the burden of filing individual statements describing their security policies, processes, and procedures, while still ensuring carrier compliance with the regulations. TCG supports this proposal for several reasons.

¹¹ Id. at ¶ 35.

Certification, in place of filing the statement, alleviates undue administrative burdens for those smaller entities with limited resources to implement CALEA, especially considering that these carriers collectively deliver less than ten percent of the dialing equipment minutes each year.¹² This outcome is consistent with the Commission's stated intention not to impose any unnecessary burdens upon those entities that are the least able to meet them.¹³ In addition, by reducing the administrative burden on small carriers, certification will not impede the development by small carriers of "new communications services and technologies," while preserving the interests of law enforcement authorities and the privacy of carrier customers, consistent with the three-prong policy goals. Finally, certification reduces administrative burdens on the Commission as well, by alleviating the Commission's obligation to review thousands of policy statements from carriers that may rarely receive interception requests.

IV. ANY NETWORK UPGRADES REQUIRED TO COMPLY WITH CALEA CAPABILITY AND CAPACITY REQUIREMENTS SHOULD BE REIMBURSABLE

TCG is concerned with two reimbursement issues: the process that will govern reimbursement for network upgrades that are not "reasonably achievable," and the continued reimbursement from law enforcement authorities of "per event"

¹² TCG supports the Commission's proposal to use the indexed revenue threshold of \$100 million (47 C.F.R. § 32.9000) as the appropriate demarcation point between large and small carriers, including CLECs.

¹³ See NPRM at ¶ 36.

interception requests. The Commission briefly addressed reimbursement for carrier compliance with CALEA that is found not to be "reasonably achievable."¹⁴

However, the Commission has not addressed the continued reimbursement to carriers for the costs of meeting specific law enforcement requests. Both these issues must be directly addressed by the Commission.

Network infrastructure upgrades likely will be required to meet the still undetermined CALEA technical capability and capacity requirements. While cost recovery will be administered by the Commission and the FBI, the Commission should ensure that cost recovery is available to all carriers subject to CALEA, even those that are not guaranteed a rate of return due to their regulatory status. The Commission should consider this rate recovery distinction when determining whether compliance with the assistance capability requirements of Section 103 (CALEA) is reasonably achievable for CLECs. TCG urges the Commission to include this as one of the factors to be considered in determining whether compliance is reasonably achievable.¹⁵

Second, the Commission should find that the per event costs for interception requests, which have been traditionally covered by the requesting law enforcement agency, should continue to be covered by the requesting agency. The Commission should also declare that this requirement applies equally to federal law enforcement agencies and to local and state agencies. The recovery of costs

¹⁴ Id. at ¶ 46.

¹⁵ Id. at ¶ 45.

implementing CALEA requirements and obligations will ensure that carriers are not impeded in the development of new communications services and technologies.

V. THE COMMISSION SHOULD CLARIFY THE DEFINITION OF AN "INTERCEPTION"

The use of "interception" and "electronic surveillance" should be clarified to avoid confusion regarding the applicability of the proposed rules. The NPRM apparently uses the word "interception" to describe any kind of law enforcement request to a carrier, ranging from simple phone log requests to actual wiretaps. Consistent with CALEA, the Commission adopted a more restrictive definition of "electronic surveillance" as:

both the interception of communications content (wiretapping) and the acquisition of call-identifying information (dialed-number information) through the use of pen register devices and through traps and traces.¹⁶

In this regard, "electronic surveillance" is closer to the standard industry definition of "interception," which generally refers only to more intrusive law enforcement requests, such as wiretaps and trap and trace requests. Title 18 of the United States Code defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic communication other than a telephone."¹⁷

¹⁶ Id. at ¶ 1.

¹⁷ 18 U.S.C. § 2510(1)(4).

Differences in the uses or definitions of these terms could result in the inconsistent application of the rules. According to TCG's internal descriptions, seven law enforcement requests could be classified as "intercepts" under the NPRM: subpoenas or summonses for subscriber information or for call records, and judicial orders for records of incoming calls, trapping and tracing of calls, the installation of a dialed number recorder or pen register, the installation of a wiretap, or the interception of voice mail. However, only four (those requiring judicial orders) could be classified as "electronic surveillance." These varying results depending on the definition of "interception" or the use of "electronic surveillance" demonstrate that the Commission should clarify the definition of "interception" and the use of both "interception" and "electronic surveillance" in terms of Commission regulations.

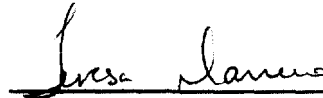
VI. CONCLUSION

Congress sought to implement three important policy goals when it enacted CALEA: preservation of narrowly focused capability for law enforcement to carry out authorized intercepts; the protection of privacy from increasingly effective technologies; and the continued development of new communications services and technologies. The Commission appropriately looked to these policy goals in proposing rules to implement CALEA. Consistent with this approach, TCG urges the Commission to limit the proposed designated employee requirements to a core group of surveillance personnel. Similarly, TCG supports the Commission's

proposal to grant smaller carriers the option of filing a certificate of compliance rather than complete security systems filing. TCG also requests that the Commission clarify the process for reimbursement of carrier network upgrades required under CALEA and provide for the continued per event cost recovery in satisfying law enforcement requests. Finally, TCG recommends that the Commission clarify what constitutes an "interception" to avoid inconsistent adherence to the regulations.

Respectfully submitted,

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Dated: December 12, 1997

CERTIFICATE OF SERVICE

I, Dottie E. Holman, do hereby certify that a copy of the foregoing Comments was sent by hand-delivery this 12th day of December, 1997, to the following:

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